Filed 10/26/09 In re Bentley G. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re BENTLEY G. et al., Persons Coming Under the Juvenile Court Law.	B210869 (Los Angeles County Super. Ct. No. CK08009)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JENNIFER L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Kading Martinez, Juvenile Court Referee. Affirmed.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Minors.

INTRODUCTION

Jennifer L. appeals from the order of the juvenile court that suspended her visitation with her children, Bentley G. (born in 2003) and J.K. (born in 2005). While the Department of Children and Family Services (the Department) has not opposed this appeal, the children have, through their court appointed attorney. Mother contends that the court's order is not supported by substantial evidence that continued visits with the children would be detrimental to them. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Family history*

We have reviewed this case in the past. On March 23, 2009, we issued an unpublished decision in mother's prior appeal (B209430). We take judicial notice of that opinion.

Mother has used methamphetamines since she was an adolescent. She has a long history of undergoing drug treatment and then relapsing. Between April 2005 and May 2006, mother and the children were in at least five treatment facilities. When the three were not in a facility, they were homeless. The child abuse hotline has received three telephone calls about Bentley and J. Mother also has an extensive criminal history.

In January 2007, after mother and the children were found inside a stolen car, the Department detained the children. Mother was taken into custody where she remained until March 2007. The juvenile court sustained a petition alleging mother's substance abuse and incarceration, and declared Bentley and J. dependents of the court. The court removed the children from mother's custody and granted mother monitored visits and reunification services.

Mother visited the children beginning in March 2007. But the continuity of her visits was interrupted when mother was incarcerated. She regularly visited the children between July 2007 and September 2007. Then, after violating probation, mother moved to Missouri in September 2007 and stopped visiting the children. She spoke to them once in October 2007.

In September 2007, the court terminated reunification and set the matter for a Welfare and Institutions Code[1] section 366.26 hearing.

2. *The children's behavior improves in their last placement*.

The children have serious behavioral problems that have caused them to bounce around four or five different foster care placements. For example, they were placed in a prospective adoptive home in August 2007 and then removed in November 2007 when their behavior deteriorated following a visit with mother. Bentley threw temper tantrums during which his face and eyes swelled up and his body stiffened. The tantrums lasted as long as an hour. Bentley also has a history of biting children, including J. Bentley tried to choke J. twice, leaving marks on her neck. Bentley lacked basic educational and socialization skills. Once placed in a foster home, he was enrolled in an educational program. But, after he threatened to kill a teacher on the second day and slapped the teacher on the third, he was asked to leave. Meanwhile, J. exhibits the behavior of an anxious child.

In February 2008, the children were placed in their fifth or sixth foster home where they have remained. Since their last move, the children's behavior finally began to stabilize. They bonded with this caregiver, who has assured that the children attend counseling and that Bentley regularly takes his psychotropic medication. By April 2008, the caregiver reported "no concerns at this time." Because J. was mimicking some of Bentley's behaviors, she was sent to counseling as well. In July 2008, the social worker described the children as "blossoming," noting they had become more verbal, were able to follow directions well, participated in activities, attended therapy, and Bentley saw a psychiatrist monthly and was less aggressive. The children called their caretaker "mommy." Bentley had improved to the point where he would move from intensive day treatment to a regular classroom in the fall, and instead of asking to have the children removed, the caretaker had decided to adopt them.

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[1] All further statutory references are to the Welfare and Institutions Code.

3. *Mother returns to California and visits resume.*

Mother's criminal sentence was extended to May 2008 and her probation extended until February 2010. In either February or April 2008, when she returned from Missouri, mother was arrested on an outstanding warrant. She was released to a criminal-court-ordered lock-down facility operated by the Family Foundations Program. Mother had not visited the children since September 2007 when she left California and had not spoken to them since October 2007. The juvenile court granted mother monitored visits in May 2008. Mother had four one-hour visits with the children between May and July 9, 2008. The visitation monitor was an employee of Family Foundations, whom the Department referred to as "mother's advocate."

Once visits resumed, Bentley's behavior deteriorated. When he returned from visits with mother, he was upset and would hit his head on the wall, once breaking his glasses. He would hold on to and repeat what mother told him during the visit, i.e., that he would be living with her in the treatment facility. According to the social worker, unlike Bentley, J. did not appear to show "any significant reactions" to the visits. Otherwise, when visits began, the children ran first to the toys rather than to mother.

In late June 2008, mother filed a section 388 petition seeking to have the children placed with her in her treatment program at Family Foundations. A letter from the child development specialist, attached to mother's petition, explained that mother was scheduled to be released in a year but, if the children were not placed with mother in the program, mother would be forced to leave and finish her three-year sentence in jail. The specialist wrote that the children have developed a close relationship with mother, and J. would hide in her mother's closet because "she did not want to leave her mother." The author added that separating the children from mother would be detrimental to them. A substance abuse counselor reported that the children were bonded with mother. The juvenile court denied mother's section 388 petition. We affirmed that order.

4. *The juvenile court orders visits suspended.*

On July 15, 2008, a month after the juvenile court denied mother's section 388 petition, the children's counsel asked the court to suspend its previous order authorizing

visits. Counsel explained that visits were proving to be detrimental to the children as they had regressed since visits began. Counsel argued that when the court had made its order in May 2008 to resume visitation, it had not addressed the fact that the children had not seen mother since the previous September. The court discounted the letter from mother's child specialist noting "[w]e cannot know *why* a three-year old was in the closet when she was told it was time to go home. It is mere speculation that she didn't want to leave her mother." (Italics added.) Instead, the court observed that mother was having regular visits because the children were being brought to her, but that "[i]f she wasn't confined, the history is that she wouldn't initiate her visits." The court then found by clear and convincing evidence that it was not in the children's best interest, and indeed was detrimental for them, to have contact with mother. The court ordered that the children not have visits with mother before the next hearing three weeks hence.

At the following hearing, mother opposed the order discontinuing visits, arguing that she had not had the opportunity to present evidence in opposition to the order, and also that the court failed to make a finding of actual detriment before suspending visitation. The court declined to hear from witnesses, explaining that it had made a finding of actual detriment at the previous hearing. Still, recognizing that the photographs mother offered depicted the children smiling, the court observed that it made the ruling barring visits because mother had not visited the children once between September 2007 until the spring of 2008, when her visits were arranged for her. The court also noted, given that mother's rights were scheduled to be terminated soon, that it would not be in the children's interest to attempt to build a relationship with mother for that short period.

Mother was removed from her residential treatment program at Family Foundations and returned to state prison in July 2008. Mother filed her appeal from the order terminating her visits.

CONTENTION

Mother contends there is no substantial evidence to support the juvenile court's finding the visits would be detrimental to the children and the juvenile court denied her due process when it refused to hear from her witnesses.

DISCUSSION

"Visitation between a dependent child and his or her parents is an essential component of a reunification plan, even if actual physical custody is not the outcome of the proceedings. [Citation.]" (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580.)

The juvenile court made its challenged ruling after reunification services were terminated. Whenever the juvenile court orders sets the section 366.26 hearing, it must also continue to permit the parent "to visit the child pending the hearing *unless it finds that visitation would be detrimental to the child*." (§ 366.21, subd. (h), italics added.) Thus, a showing of detriment to the child is required before the juvenile court may deny visitation. (*In re Mark L., supra*, 94 Cal.App.4th at p. 580.)

" ' " 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citations.]" [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." [Citation.]' [Citation.]" (*In re Mark L., supra,* 94 Cal.App.4th at pp. 580-581, fns. omitted.)

Substantial evidence is evidence that is " 'reasonable, credible, and of solid value -- such that a reasonable trier of fact could find' " that termination of parental rights is appropriate based on clear and convincing evidence. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924, superceded on aother point by *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212.) "We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the

evidence or the reasonable inferences which may be drawn from that evidence. [Citations.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

There is ample evidence here to support the juvenile court's specific finding "by clear and convincing evidence [that it was] not in the children's best interest and [would be] detrimental for them to have contact with their mother." The court's ruling came after it had already denied mother's section 388 petition seeking to have the children placed with her. Stated otherwise, the court repeatedly determined it was not in the children's best interest to be placed with mother. After bouncing around numerous placements that failed often because of Bentley's difficult behavior, the children had finally found a stable, loving home. All of the social worker's reports after this last placement reflect marked improvement in Bentley's conduct. Under the prospective adoptive mother's care, and after nine months without contact with mother, both children were stabilizing emotionally, "blossoming," and happy. By April 2008, the caretaker reported no concerns. In contrast, as soon as visits with mother resumed, Bentley's behavior deteriorated. When Bentley came home from visits with mother, he was upset and self-destructive, repeating that he would be returning to live with mother in her facility. The stark contrast in the emotional well-being of the children before and after exposure to mother is a palpable reflection of detriment.

Mother's evidence does not diminish this showing of detriment. Mother submitted a letter from her visitation monitor, a so-called child development specialist, who wrote that the children had developed a close relationship with mother; that separating them from mother would be detrimental to them; and that J. hid in her mother's closet because "she did not want to leave her mother." A substance abuse counselor also opined that the children had bonded with mother. However, the juvenile court rejected this evidence, noting that it was impossible to speculate about what a child is expressing when she hides in a closet. We may not reweigh the juvenile court's finding of credibility or its determination of the effect of the evidence. (*In re Casey D., supra*, 70 Cal.App.4th at pp. 52-53.) Indeed, the court was entitled to discount this evidence, particularly where there is no indication of the training and qualifications of these two authors that entitles

them to opine about the emotional well-being of children. Also, the court could reasonably have believed that these opinions were prompted by the need to have the children placed with mother so she could remain in the program. Immediately after opining about detriment to the children of not moving in with mother, the child development specialist explained that mother could not remain in her treatment program unless the children were placed with mother. Mother returned to prison shortly after the court denied her visitation. To the extent these letters reflect the desire for mother to reunify with her children, mother's efforts come too late. Services were terminated in 2007 and "[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Mother argues that the denial of visits at this point in the dependency will have an impact on her ability to prove the exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). But, mother is not guaranteed visitation. Under the Welfare and Institutions Code, visitation is to "be as frequent as possible, consistent with the well-being of the child" (§ 362.1, subd. (a)(1)(A)), but that "[n]o visitation order shall jeopardize the safety of the child" (§ 362.1, subd. (a)(1)(B); see also *In re Mark L.*, *supra*, 94 Cal.App.4th at p. 580), and the juvenile court may put a stop to visitation if it finds, as it did here, that visits were "detrimental to the child." (§ 366.21, subd. (h).)

Mother argues that Bentley's acting out demonstrates "a significant connection with his mother was still very much present." Yet, mother omits to note in what way that connection was "significant." The court was entitled to conclude that Bentley's outbursts, emotional turmoil, and his self-destructive behavior indicate a negative connection, i.e., distress from learning that he would be moving in with mother. Stated otherwise, his contact with mother was significantly detrimental.

Next, mother contends that she was denied due process when the juvenile court refused to hear from her witnesses. Mother intended to call her visitation monitor at Family Foundations and the substance abuse counselor. There was no denial of due process. First, the testimony would have been redundant. (Cf. Evid. Code, § 352.)

These witnesses' letters were in the record; and mother's counsel stated that the testimony would indicate "how [the] visits go, the nature of the visits, the quality, the behavior of the children, and the mother [at the] visits," all of which information was in the letters. Second, the court was not required to hear from witnesses, particularly where their testimony would have been redundant. At a section 388 hearing, "proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court." (Cal. Rules of Court, rule 5.570(h).) Third, the court held two hearings into the children's attorney's request to change the visitation order, one on July 15 and the other on July 21, 2008. At the latter hearing, the court looked at the evidence mother submitted.

Mother overlooks the effect that her contact has on the children when she argues that along with the therapeutic support the children had begun to receive, the court should simply have instructed mother not to talk about their living with her. All that these children know about living with mother is instability and disruption characterized by homelessness, lack of schooling, discipline or socialization, whereas they are safe, stable, and have permanency with the caregiver to such an extent that they are now "blossoming" emotionally, socially, and educationally. That is the goal of the dependency at this juncture. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) The evidence supports the juvenile court's finding of detriment and denying visitation.

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J. CROSKEY, J.